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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Don Shapiro Industries, Inc.

Serial No. 74/589,365

Barry Kramer of Cummings & Lockwood for Don Shapiro
Industries, Inc.

Lesley LaMothe, Trademark Examining Attorney, Law Office 108
(David Shallant, Managing Attorney)

Before Seeherman, Hanak and Hohein, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Don Shapiro Industries, Inc. has appealed the refusal
of the Trademark Examining Attorney to register CONTOUR as a
trademark for "clothing, namely jeans, denim jackets,
button-down shirts, shorts and dress pants for women and
children."¹ Registration has been finally refused pursuant

¹ Application Serial No. 74/589,365, filed October 24, 1994.
The application was initially filed based on a bona fide
intention to use the mark in commerce, and identified the mark as
CONTOURS. On April 19, 1996 applicant filed an amendment
alleging first use on October 1, 1995 and first use in commerce

to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark, as used on its identified goods, so resembles the mark CONTOURS, registered for women's clothing, namely panties,² as to be likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney filed briefs, and applicant filed a reply brief. Applicant initially requested an oral hearing, and then withdrew the request.

We affirm the refusal of registration.

In reaching our decision, we have considered all duPont factors which are applicable to this case. **In re E. I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Turning first to the marks, we find that they are virtually identical in appearance, pronunciation and connotation. The fact that the registered mark has a final "S", while applicant's mark does not, does not distinguish them. Consumers are not likely to note the presence or absence of this letter when viewing the marks individually. And, under actual marketing conditions, consumers often do not have the luxury to make a side-by-side comparison

on October 30, 1995. The specimens submitted with the amendment to allege use showed the mark as CONTOUR, and we note that with her appeal brief, the Examining Attorney stated that she had agreed to allow the applicant to amend its mark to match the specimens by deleting the final "S." Accordingly, the drawing has been amended to show the mark as CONTOUR.

between marks, and instead must rely on hazy past recollections. **In re Dassler KG v. Roller Derby Skate Corp.**, 206 USPQ 255 (TTAB 1980). It would appear that even applicant did not note the difference between CONTOUR and CONTOURS in connection with its own use of the mark. As pointed out in footnote 1, applicant initially applied for its mark as CONTOURS and, although the specimen labels submitted with its amendment to allege use showed the mark as CONTOUR, applicant continued to identify its mark as CONTOURS in its amendment to allege use, request for reconsideration and appeal brief.³

We have considered, but are not persuaded by, applicant's argument that the marks, because of the differences of the goods with which they are used, convey different connotations. We agree with applicant that registrant's mark CONTOURS for panties suggests a shapely figure, but we think the same connotation is suggested by applicant's mark CONTOUR. The specimen labels submitted by applicant reinforce this connotation, as they depict a woman wearing form-fitting jeans. We would also point out that, although applicant characterizes its goods as denim clothing, the identification is not so limited, and includes

² Registration No. 1,772,450, issued May 18, 1993.

³ We would also point out that if CONTOURS and CONTOUR did not create the same commercial impression, applicant would not have been permitted to amend its drawing to conform the mark shown therein to that in the specimens.

shorts and dress pants for women. To the extent that applicant is correct that panties are used to accentuate the body's contours, shorts and dress pants can also be form fitting and used to accentuate one's shape.

With respect to the goods, there are obvious differences between ladies' panties and the women's and children's outerwear identified in applicant's application. However, it is well-established that it is not necessary that the goods of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. **In re International Telephone & Telegraph Corp.**, 197 USPQ 910, 911 (TTAB 1978)

The Examining Attorney has submitted three third-party registrations which show, in each instance, that an entity has registered a single mark for outerwear such as the goods identified in applicant's application and for underwear.⁴

⁴ See, for example, Registration No. 1,294,523 for PATAGONIA and design for, inter alia, jackets, pants, shorts, shirts and underwear; Registration No. 1,465,578 for THE AMERICAN DREAM for,

These registrations have probative value to the extent that they suggest that the listed goods are of a type which may emanate from a single source. **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

The Examining Attorney has also made of record catalogs which show that panties and goods such as those identified in applicant's application are sold in the same stores. These, by themselves, would not necessarily demonstrate the relatedness of the goods since, as applicant points out, department stores may carry a wide range of clothing items. Applicant has, in fact, submitted evidence that women's lingerie departments are separate from other women's clothing departments, including those that sell denim clothing. Moreover, the Examining Attorney's submissions do not show that outerwear and panties are advertised together; on the contrary, they appear to be advertised in different sections of the catalog.

Nonetheless, we find that ladies' panties and, in particular, women's jeans, shorts and dress pants, are sufficiently related that confusion is likely to result if

inter alia, pants, jackets, shirts and undergarments; shorts, slacks, shirts. The Examining Attorney submitted additional third-party registrations, but they do not refer specifically to underwear or panties, so we could not consider them to encompass the goods listed in the cited registration. Nor, because of the very nature of a housemark, do we find the third-party registration for a house mark for a full line of clothing persuasive on the issue of the relationship between the goods involved herein.

they were sold under, respectively, the marks CONTOURS and CONTOUR. Although panties are underwear and the applicant's clothing is outerwear, they can be purchased and used by the same consumer. Further, a consumer might well purchase both types of items in the course of a single shopping trip, or purchase panties specifically to be worn with the outerwear. In this connection, we note that the clothing pictured in applicant's specimen label is somewhat revealing, and would require panties that would fit with the cut of the outerwear.

Applicant has submitted copies of several third-party registrations for marks which include the term CONTOURS in order to demonstrate that "CONTOURS is a weak mark entitled to a limited scope of protection vis-à-vis other marks which use the term CONTOURS for clothing products," and "that these registrations are able to co-exist on the Principal Register without causing a likelihood of confusion with each other." Brief, p. 10.

Third-party registrations can, of course, be used to show the meaning of a mark in the same way that dictionaries do. **Mead Johnson & Company v. Peter Eckes**, 195 USPQ 187 (TTAB 1977). The registrations applicant has made of record confirm the dictionary meaning of CONTOUR[S] for clothing,

namely, that it suggests shapeliness.⁵ While in certain cases the presence of a common suggestive element in two marks may not be sufficient to support a finding of likelihood of confusion, see **Tektronix, Inc. v. Daktronics, Inc.**, 187 USPQ 588 (TTAB 1975), in the present case there are no other elements apart from the word CONTOUR[S] in applicant's mark and the registered mark which would enable consumers to distinguish them.

The second part of applicant's argument is that the Patent and Trademark Office has determined that the various third-party marks are not likely to cause confusion with each other and that, by implication, applicant's mark is not likely to cause confusion with the cited registration. Initially, we would point out that there are only five registrations made of record by applicant. The other marks are the subject of applications. Applicant argues that because many of those applications were approved for publication, they may "be taken as some evidence that the Trademark Office did not find that the mark created a likelihood of confusion with any prior filed mark." Brief, p. 12. We disagree. Until a mark is registered, the Patent and Trademark Office may restore jurisdiction of the

⁵ We note that applicant has characterized the registered mark as being "highly descriptive." We cannot construe the third-party registrations to demonstrate this; indeed, in view of the Section 7(b) presumptions accorded to a registered mark,

application to the Examining Attorney for issuance of a refusal of registration. In any event, none of the applications is as similar in mark and/or goods as applicant's mark and goods are to the cited registration.

Of the five registrations, one, for the mark COZY CONTOURS, is owned by the owner of the cited registration. Furthermore, CONTOUR 1 for gloves and THE CONTOUR for men's and boy's outer shirts, are for goods which do not appear on their face to be as related to ladies' panties as applicant's goods are. The registration for COSMICONTOURS for shirts has been cancelled, but in any case the mark presents a different commercial impression from CONTOURS, something applicant's mark does not do. Finally, while CONTOUR BRIEFS BY QUEEN CASUALS is for ladies' panties, the commercial impression of the marks is different, as CONTOUR BRIEFS describes the goods, and in fact this part of the mark has been disclaimed.

Decision: The refusal of registration is affirmed.

E. J. Seeherman

E. W. Hanak

applicant cannot make such a collateral attack on the cited registration.

Ser No. 74/589,365

G. D. Hohein
Administrative Trademark Judges
Trademark Trial and Appeal Board